Supreme Court, U.S.
FILED
SEP 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2076

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ARLENE B. SINGER and
JOEL D. JOSEPH,

Petitioners,

v.

SHANNON & LUCHS COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED

Respondent submits that the questions presented for review are as follows:

(1) Whether a federal court of appeals may award just damages in the form of reimbursement for attorneys' fees and expenses, which Fed. R. App. P. 38 permits the court to award the appellee in a frivolous appeal, when there is no rule or court order prescribing any time for motions for attorneys' fees and the appellee first requests such an award shortly after the appellant's petition for a writ of certiorari has been denied by this Court.

(2) Whether an appellant has been accorded due process of law when a federal court of appeals, which has rejected an appeal on the merits after receiving the appellant's briefs and hearing oral argument, determines that the appeal is frivolous after the appellant had a second opportunity to argue—and did argue—the question of frivolousness before the court determined it was frivolous.

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ARLENE B. SINGER and
JOEL D. JOSEPH,

Petitioners,

v.

SHANNON & LUCHS COMPANY,

Respondent.

BRIEF IN OPPOSITION

Respondent Shannon & Luchs Company ("Shannon & Luchs") opposes the petition for a writ of certiorari filed with the Court by Arlene B. Singer and Joel D. Joseph ("Singer and Joseph"). The decision of the court below is consistent with the sound practice followed in that court for determining the timeliness of motions for attorneys' fees, upon which practice Shannon & Luchs relied. It would be inequitable and unjust to upset this practice in this case and deprive Shannon & Luchs of compensation that the court below deemed appropriate because of the "egregiously objectionable conduct" in which Singer and Joseph have engaged. *Singer* v. *Shannon & Luchs Company*, 868 F.2d 1306, 1308 (D.C. Cir. 1989).

CITATION TO OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The district court judgment, from which the appeal deemed frivolous by the court of appeals was taken, is reported with the district court's memorandum opinion at 670 F. Supp. 1024. The court of appeals' decision affirming that judgment without opinion and its order awarding attorneys' fees and expenses are not reported. They are reproduced as Appendices A and B, *infra*, pp. 1a-4a. The court's denial of petitioners' petition for rehearing of its award is reported with the court's opinion at 868 F.2d 1306.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The pertinent provision of the Fifth Amendment to the Constitution of the United States reads as follows:

> No person shall be . . . deprived of . . . property, without due process of law. . . .

Rule 38 of the Federal Rules of Appellate Procedure reads as follows:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

The pertinent provisions of Rule 39 of the Federal Rules of Appellate procedure read as follows:

> (c) Costs of Briefs, Appendices, and Copies of Records. By local rule the court of appeals shall fix the maximum rate at which the cost of printing or otherwise producing necessary copies of briefs, appendices, and copies of

> records authorized by Rule 30(f) shall be taxable. . .
>
> (d) Bill of Costs; Objections; Costs to be Inserted in Mandate or Added Later. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which the party shall file with the clerk, with proof of service, within 14 days after the entry of judgment. . .

The pertinent provisions of Rule 47 of the Federal Rules of Appellate Procedure read as follows:

> Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules.

STATEMENT OF THE CASE

The litigation from which the instant petition arises began almost eight years ago—in January 1982—when Singer and Joseph commenced an action in the United States District Court for the District of Columbia, in which they sought to enjoin Shannon & Luchs from enforcing a promissory note and related deed of trust that Singer and Joseph had executed. Shannon & Luchs filed a counterclaim on the note and deed of trust, which expressly granted Shannon & Luchs, as holder of the note, the right to recover from Singer and Joseph its "costs, expenses and attorney's fees

incurred . . . with respect to this trust, the said note or the land and premises herein described."

After a summary judgment was entered on Shannon & Luchs' counterclaim, the district court on January 10, 1984, awarded Shannon & Luchs costs and attorneys' fees and expenses in the amount of $78,115.60. Singer and Joseph appealed this award.[1] The court of appeals upheld Shannon & Luchs' right to recover its attorneys' fees and expenses under the provision in the deed of trust, but remanded the case to the district court for appropriate findings. *Singer v. Shannon & Luchs Company*, 779 F.2d 69 (D.C.Cir. 1985).

On remand, the district court on February 10, 1987 made extensive findings and entered a new judgment for attorneys' fees and expenses—this time in the amount of $69,981.14. *Singer v. Shannon & Luchs Company*, 670 F. Supp. 1024 (D.D.C. 1987). In his memorandum opinion and order, the district judge detailed the "long, circuitous and tortured journey this case has taken through the judicial system" (*Singer* v. *Shannon & Luchs Company*, 670 F.Supp. at 1025)—during which Singer and Joseph resorted to numerous procedural maneuvers, both in the federal and District of Columbia court systems, in an effort to avoid the obligation they had undertaken. The court based its award upon the "contractual undertaking of the parties," but specifically pointed out that this choice of basis for the award was simply a

[1] The claims of Singer and Joseph were dismissed in return for a contingent promise to pay an amount that the district court in a subsequent opinion described as a "nuisance value settlement." *Singer v. Shannon & Luchs Company*, 670 F. Supp. 1024, 1028 (D.D.C. 1987).

matter of discretion. In the words of the court, "we have in our discretion decided not to award fees based on vexatiousness and bad faith, however justified such an award might be." *Id.* at 1028-1029.

The district court's judgment was affirmed without opinion on November 20, 1987.[2] Singer and Joseph thereupon filed a petition for rehearing and suggestion for rehearing *en banc*, both of which were denied by the court of appeals on January 19, 1988. On April 18, 1988, they petitioned this Court for a writ of certiorari. That petition was denied on October 3, 1988.

Unwilling to accept this Court's denial of their petition as the final ruling on the district court's award of attorneys' fees and expenses, Singer and Joseph then filed an application with this Court for an extension of time within which to file a petition for rehearing. That application was presented to the Chief Justice and denied on November 14, 1988. *See* Appendix C, *infra*, p. 5a.

On October 31, 1988—twenty-eight days after this Court denied the petition for a writ of certiorari and while Singer and Joseph were still engaged in efforts to petition the Court for a rehearing of that denial—Shannon & Luchs filed a motion in the court of appeals for appellate attorneys' fees. That motion was not filed earlier in accordance with the practice in

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[2] The court of appeals in its order affirming the judgment stated that "[t]he issues have been accorded full consideration by the Court" and found that they "occasion no need for an opinion." The court expressed its "substantial agreement with the reasons and conclusions expressed in the memorandum opinion and order of the District Court." Appendix A, *infra*, p. 2a.

the court below of not filing motions for attorneys' fees until after petitions to this Court have been resolved. The motion provided all the supporting documentation required by *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982).

Singer and Joseph filed an opposition to that motion on November 10, 1988, in which they expressly argued that their appeal was not frivolous.[3] Shannon & Luchs' motion was granted on January 5, 1989, and Shannon & Luchs was awarded $13,163.00 to compensate it for the attorneys' fees and expenses incurred in connection with Singer and Joseph's appeal from the February 10, 1987 judgment of the district court. *See* Appendix B, *infra*, pp. 3a-4a. Although the district court had chosen to limit its award to those attorneys' fees and expenses that it found justified by the provisions in the deed of trust Singer and Joseph had executed (*Singer v. Shannon & Luchs*, 670 F. Supp. at 1028-1029), the court of appeals determined that the "appeal in this case was frivolous" and based its award upon Fed. R. App. P. 38. *Singer v. Shannon & Luchs Company*, 868 F.2d at 1308.

The court below has no local rule setting a deadline for motions for attorneys' fees under Fed. R. App. P. 38, or any other provision of law. *Compare* Federal Circuit Rule 20; Third Circuit Rule 27; Ninth Circuit Rule 39-1. The court's practice is to apply the equitable principle of laches to such motions. In rejecting

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[3] Singer and Joseph's two-page opposition is appended hereto as Appendix D, *infra*, pp. 6a-7a. Their argument on the question whether their appeal was frivolous appears on the second page, *infra*, p. 7a.

the argument of Singer and Joseph that its award was barred because Shannon & Luchs had not filed a motion for attorneys' fees within the 14-day period within which costs for printing of briefs, appendices and records must be requested under Fed. R. App. P. 39, the court below reasoned as follows:

> The allowance of an application under Rule 38 long after the time will have expired for a bill of costs under Rule 39 is justified by the special purpose of the former rule. It seeks to deter and punish frivolous appeals. The social interest in so doing, and the standard of egregiously objectionable conduct that triggers its application, justify imposing fewer technical restrictions.

Id.

SUMMARY OF ARGUMENT

Neither question presented for review has substance. The practice followed in the court below of employing the doctrine of laches to determine the timeliness of a motion for an award of attorneys' fees under Fed. R. App. P. 38, is a sound practice. It permits the appellee and the court to wait until this Court has disposed of any petition for a writ of certiorari before turning their attention to the question of a Rule 38 award. The fact that other circuits have adopted different approaches—customarily incorporated in local rules—does not create a conflict on any matter as to which uniformity among the federal courts of appeals is either necessary or desirable. The second question presented for review—whether the court of appeals is constitutionally compelled to afford the appellant a second argument before it can

determine that an appeal is frivolous—is itself a frivolous question. First, Singer and Joseph not only had an opportunity to argue that their appeal was not frivolous, they in fact presented such an argument. The question on which Singer and Joseph seek review thus is not even presented by the record of this case. Second, there is no reason whatsoever to have two presentations of the same appellate arguments—the first to determine if they are meritorious, the second to determine if the same arguments are frivolous. Once presented, the court can evaluate the arguments for both determinations, and there is no reason that the appellant needs another opportunity to be heard if the court decides the merits first and the question of frivolousness later.

REASONS FOR DENYING THE PETITION

I

THE HOLDING OF THE COURT BELOW THAT, IN THE ABSENCE OF A LOCAL RULE OR COURT ORDER PRESCRIBING A TIME FOR SUCH MOTIONS, A MOTION FOR SANCTIONS UNDER FED. R. APP. P. 38, MAY BE MADE SHORTLY AFTER THIS COURT HAS DISPOSED OF APPELLANT'S PETITION FOR A WRIT OF CERTIORARI REFLECTS A SOUND JUDICIAL PROCEDURE

The decision of the court below to accept Shannon & Luchs' motion for attorneys' fees as timely is manifestly correct. The motion was filed less than 30 days after this Court denied the petition for writ of certiorari filed by Singer and Joseph, during a time when Singer and Joseph were still trying to overturn the court of appeal's decision on their appeal. There was no rule of court or any other basis for holding

the motion untimely. Fed. R. App. P. 39, by its own terms, does not apply to motions for attorneys' fees. Any other decision by the court below would have penalized Shannon & Luchs for following the Court's own practice.

The fact that other federal courts of appeal have adopted different practices with respect to attorney fee petitions is of no real consequence. There is no need for national uniformity on this matter. In fact, the time within which attorney fee petitions should be filed is precisely the kind of question that is best left to local discretion under Fed. R. App. P. 47—and, as the petition points out, at least three courts have adopted local rules on the subject. Federal Circuit Rule 20; Third Circuit Rule 27; Ninth Circuit Rule 39-1. The Fifth Circuit, in *Knoblauch* v. *Commissioner*, 752 F.2d 125 (5th Cir.), *cert. denied* 474 U.S. 830 (1985), announced that it would consider requests for attorneys fees and other Rule 38 sanctions as petitions for rehearing governed by the 14-day period in Fed. R. App. P. 40.[4] The court's announcement, however, is accompanied by no reasoning, and the resulting practice is not ostensibly superior to the practice followed in the court below. The question Singer and Joseph ask the Court concerning the timeliness of a motion for attorneys' fees under Fed. R. App. P. 38 thus is not an important question that this Court needs to settle.

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[4] The time period in Fed. R. App. P. 40 is itself subject to being altered "by order or by local rule." Thus, even if it were accepted that a Rule 38 motion is analogous to a petition for rehearing, individual courts of appeals would have the flexibility to provide different time periods for Rule 38 motions.

II

PETITIONERS WERE NOT DEPRIVED OF DUE PROCESS OF LAW

Shannon & Luchs' motion for attorneys' fees and expenses stated the specific amount of fees and expenses requested. The motion was supported by all documentation required under *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C.Cir. 1982), including time records showing the time spent on each day for each task by each attorney who worked on the appeal, the hourly rates employed to determine the fee charged for the work and an affidavit attesting that the rates are reasonable rates at a level that prevails in the community for work comparable to that performed in this case.

Singer and Joseph filed an opposition to this motion on November 10, 1988. *See* Appendix D, *infra*, pp 6a-7a. In this opposition, they explicitly contended that their appeal was not frivolous. They supported that contention with the misleading assertion that "virtually the same result was reversed by this court on two occasions, once summarily." Appendix D, p. 7a. They could, of course, have presented any argument they wished on the question. Singer and Joseph thus had the opportunity to present—and did present—the very argument they now contend they were not afforded an opportunity to present. The second question they ask this Court to review thus is not even presented by the record in this case.

Beyond this, the underlying position urged by Singer and Joseph makes no sense. There certainly is no need, much less a constitutional mandate, to afford an appellant two arguments on the merits of

his appeal. Once the court of appeals has heard and decided an appeal, the question whether the appeal was frivolous needs no additional argument.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES P. MERCURIO
Counsel of Record
ROBIN ROWLAND
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1050 Connecticut Avenue,
Washington, D.C. 20036-5339
(202) 857-6092
Attorneys for Respondent

September 14, 1989

APPENDIX

APPENDIX A

NOT TO BE PUBLISHED - SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

NO. 87-7053

ARLENE B. SINGER, *et al.*,

Appellants

v.

SHANNON & LUCHS COMPANY,

Appellee

United States Court of Appeals
For the District of Columbia Circuit

FILED NOV 20 1987

GEORGE A. FISHER
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before ROBINSON and WILLIAMS, *Circuit Judges*, and MYRON L. GORDON*, *Senior District Judge*

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia, and was briefed and argued by counsel.

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* Of the United States District Court for the Eastern District of Wisconsin, sitting by designation pursuant to 28 U.S.C. § 294(d).

The issues have been accorded full consideration by the Court, and occasion no need for an opinion. *See* Local Rule 14(c).

On consideration thereof, the Court, being in substantial agreement with the reasons and conclusions expressed in the memorandum opinion and order of the District Court, *Singer* v. *Shannon & Luchs Company*, Civ. No. 82-151 (D.D.C. Feb. 10, 1987), it is

ORDERED and ADJUDGED by the Court that the judgment of the District Court appealed from in this cause be and hereby is affirmed. It is

FURTHER ORDERED by the Court, *sua sponte*, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 15.

Per Curiam
For the Court

/s/ George A. Fisher
George A. Fisher
Clerk

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988

No. 87-7053
C.A. No. 82-00151

Arlene B. Singer, et al.

Appellants

v.

Shannon & Luchs Company,

Appellee

United States Court of Appeals
For the District of Columbia Circuit

FILED JAN 05 1989

CONSTANCE L. DUPRÉ
CLERK

BEFORE: Robinson and Williams, Circuit Judges, and Gordon, Senior District Judge, United States District Court for the Eastern District of Wisconsin
District Court
for the Eastern District of Wisconsin

ORDER

Upon consideration of appellee's Motion For Appellate Attorneys' Fees, the opposition thereto and of the reply, it is

ORDERED, by the Court, that appellee's motion is granted and attorneys' fees in the amount of $13,163.00 are awarded to appellee and taxed jointly and severely against Arlene B. Singer and Joel D. Joseph.

The Clerk is directed to transmit a certified copy of this order to the District Court.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

November 14, 1988

Mr. James Mercurio
Arent, Fox, Kintner, et al.
1050 Connecticut Ave. N.W.
Washington, DC 20036

Re: Arlene B. Singer and Joel D. Joseph,
v. Shannon & Luchs Company
Application No. A-376 (87-1928)

Dear Mr. Mercurio:

The application for an extension of time within which to file a petition for rehearing in the above-entitled case has been presented to the Chief Justice, who on November 14, 1988, endorsed thereon the following:

"11/14/88
Denied
WHR"

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By

Francis J. Lorson
Chief Deputy Clerk

NOTE - FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-7053

Arlene B. Singer, et al.,

Appellants

v.

Shannon & Luchs Company

Appellee

United States Court of Appeals
For the District of Columbia Circuit

FILED NOV 10 1988

CONSTANCE L. DUPRÉ
CLERK

OPPOSITION TO SHANNON & LUCHS COMPANY'S MOTION FOR ATTORNEYS' FEES

Appellants oppose appellee's untimely motion for attorneys' fees.

This court affirmed the decision of the district court nearly one year ago on November 20, 1987.

Motions for attorneys' fees must be filed within 14 days of the court's affirmance. *Knoblauch v. Commissioner*, 752 F.2d 125, 127 (5th Cir, 1985). The court in that case ruled that the 14 day period applied because the motion is either a petition for rehearing or a bill of costs, and concerning both the same time period applies. The court also ruled that if a motion for leave to file is filed within a short period after the 14 day period expires and "good cause"

for the delay is shown, the motion for leave may be granted. in *Knoblauch* the court allowed the motion to be filed because good cause was shown for the 12-day delay.

Shannon & Luchs filed no motion for leave and otherwise showed no cause whatsoever for its year-long delay.

Further, appellants contend that Shannon & Luchs is not entitled to a further award of attorneys' fees under the released deed of trust and that the requested award is unreasonable. Shannon & Luchs is asking for *ten times* the amount found to be reasonable in *Knoblauch*, even though there was a finding in that case that the appeal was frivolous. There was no finding that the instant appeal was frivolous; virtually the same result was reversed by this court on two occasions, once summarily.

For these reasons, however, appellants will not further respond to the particulars of this untimely motion, unless and until the court deems that Shannon & Luchs' motion is a motion for leave to file their motion out of time. Appellants respectfully request that the motion be denied.

/s/ Joel D. Joseph
JOEL D. JOSEPH
7201 Wisconsin Avenue
Suite 720
Bethesda, MD 20814
657-1616
Attorney for Appellants

CERTIFICATE OF SERVICE

I certify that I have mailed a copy of this opposition to Robin Rowland, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036, this 10th day of November, 1988.

/s/ Joel D. Joseph
JOEL D. JOSEPH